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IN THE
COURT OF APPEALS OF INDIANA

RICHARD J. JOHNSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A04-0601-PC-50
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Gene R. Duffin, Senior Judge
Cause No. 20C01-9712-CF-66

October 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Richard J. Johnson appeals the denial of his petition for post-conviction relief. We affirm.

Issues

We restate Johnson's issues as follows:

I. Whether he received ineffective assistance of appellate counsel; and

II. Whether the post-conviction court erred in denying his claim of newly discovered evidence.

Facts and Procedural History

On November 24, 1997, Johnson and his friends, Brandon Ennis, Jeremy Lamarr, and Jason Laws, attended a party at the residence of Johnson's girlfriend, Amanda Pietro. One of the partygoers, Chris Butler, saw Steven Strycker at the party and accused Strycker of molesting his friend's niece. Johnson observed the heated argument developing between Butler and Strycker. He took Strycker, whom he barely knew, into the kitchen to protect him from Butler and the other partygoers. In the kitchen, Strycker explained that he had purchased cocaine from someone at Pietro's house the night before, and he later discovered that it was fake. He had come back to Pietro's house hoping to confront the seller who had duped him. Johnson told Strycker that it would not be wise to initiate such a confrontation, and he offered to obtain some real cocaine for Strycker. Strycker gave Johnson fifty dollars. Johnson then left the party with Lamarr and Pietro to purchase beer. On the way, Lamarr told Johnson that he should not assist Strycker in obtaining cocaine because Strycker was a "snitch." Trial Tr. at 346. When they returned to the party, Johnson told Strycker to come

with him, under the guise of obtaining cocaine, but with the intention of "beat[ing] his ass." *Id*. at 393. Johnson, Ennis, Lamarr, Pietro, and Strycker left the party together, and Lamarr drove them to the outskirts of town per Johnson's instructions.

In the car, Johnson asked Strycker if he was a snitch, and Strycker replied that he was not. Johnson told Strycker not to lie and punched him in the face. Johnson asked Strycker repeatedly if he was a snitch, and each time Strycker answered in the negative, Johnson hit him in the face. Ennis kicked and hit Strycker as well. Strycker's face was bloody, and he had a black eye.

When they arrived at the Timberbrook Mobile Home Park, Johnson told Lamarr to drive into an alleyway. Johnson, Ennis, and Strycker exited the car and walked into the woods. More than thirty minutes later, Johnson and Ennis returned to the car without Strycker. Johnson had blood on his hands and pants and was holding a broken, bloody fingernail file and Strycker's jacket. Lamarr asked about Strycker's whereabouts, and Johnson told him that Strycker was "back there." *Id*. at 106. He told Lamarr that they were leaving and that Strycker "ain't coming with us." *Id*. at 106-08. Johnson said that he "stuck" Strycker a few times. *Id*. at 107. The group drove back to Pietro's house. They picked up Strycker's bicycle and put it in the trunk. Then they drove to Johnson's brother's house, where Johnson got a change of clothes. Afterward they drove to Ennis's house, where Johnson and Ennis cleaned themselves up. Johnson changed clothes while Pietro and Lamarr tried to clean Strycker's blood from inside the car. Johnson gave his bloody clothes to Pietro's aunt and asked her to wash them. The next morning, he threw away the weapons on his way to Laws's house. He told Laws that Strycker "wouldn't be talking to nobody no

more" and that "we beat the fuck out of him" and "stabbed him." *Id*. at 297-99. A day or two later, Johnson and Pietro moved to another town.

On November 27, 1997, Strycker's body was found in the woods. He had multiple contusions and stab wounds to his face and head, a broken nose, and swollen lips. He had stab wounds to his leg, neck, left chest, and back. One stab wound penetrated his lungs, another his heart. He had been burned on over thirty percent of his body.

After the police located Pietro and talked with her, Johnson obtained a bus ticket and fled to Oklahoma City. He was arrested upon his arrival. In their investigation, the police discovered blood in Lamarr's car and blood on the clothes Johnson had worn the night of the murder. Johnson admitted to police that he had stabbed Strycker in the neck.

The State charged Johnson and Ennis with murder. At the time of Johnson's trial, Ennis had already pled guilty and received a fifty-five year sentence. In his factual basis, Ennis had implicated Johnson in the murder. When the State called Ennis to testify at Johnson's trial, however, he answered a few general questions and then asserted his Fifth Amendment right against self-incrimination. Ennis was found in contempt three times, and the trial court imposed a consecutive eighteen-month sentence. The trial court did not allow the State to introduce Ennis's police statements, in which he had implicated himself and Strycker in the murder.

Johnson testified that he beat up Strycker in the car but had no intention to kill him. He said that he gave Ennis his knife in the woods and that Ennis stabbed Strycker and set him on fire. He said that he helped Ennis drag Strycker to a different location and that Strycker was still breathing when they left him there. At the close of evidence, the trial court

instructed the jury on, among other things, accomplice liability and the lesser included offense of involuntary manslaughter. Johnson's counsel did not object to any of the court's final instructions. The jury found Johnson guilty of murder.

On direct appeal, Johnson's appellate counsel raised one issue, that trial counsel was ineffective for failing to request an immediate limiting instruction after Ennis refused to testify. On November 12, 1999, the Indiana Supreme Court affirmed Johnson's conviction. *See Johnson v. State*, 719 N.E.2d 812 (Ind. 1999). On May 13, 2004, Johnson filed a petition for post-conviction review. On October 27, 2005, the post-conviction court issued an order denying Johnson's petition. He now appeals.

Discussion and Decision

Our standard of review is well-settled.

> A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review. The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Furthermore, while we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

Specht v. State, 838 N.E.2d 1081, 1083 (Ind. Ct. App. 2005), *trans. denied* (2006).

I. Ineffective Assistance of Appellate Counsel

A. Failure to Raise Errors of Trial Counsel on Direct Appeal

In his petition for post-conviction relief, Johnson alleged that his appellate counsel was ineffective because he "raised ineffective assistance of trial counsel in the direct appeal but did not include all instances of trial counsel error."[1] Appellant's Br. at 10. This decision by Johnson's appellate counsel foreclosed him from raising the issue of trial counsel ineffectiveness on post-conviction. *See Craig v. State*, 804 N.E.2d 170, 174 (Ind. Ct. App. 1994 (because defendant presented a claim of ineffective assistance of trial counsel on direct appeal, doctrine of res judicata bars him from relitigating the issue in post-conviction proceedings, even if based on different grounds).

A claim of ineffective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel's performance was deficient, *i.e*. that it fell below an objective standard of reasonableness. *Id*. at 687-88. Second, the defendant must establish that the deficient performance prejudiced his defense, *i.e*. that there is a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. *Id*. at 687, 694.

> In a claim that appellate counsel provided ineffective assistance regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. In determining whether appellate counsel's performance was deficient, the reviewing court considers the information available in the trial record or otherwise known to appellate counsel. . . . Appellate counsel's decision regarding what issues to raise and what arguments to make is one of the most important strategic decisions to be made by appellate counsel. . . . To prevail on a claim of ineffective assistance of appellate counsel, a defendant must . . . show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be

[1] Johnson's appellate counsel challenged trial counsel's effectiveness only as to his failure to request a limiting instruction regarding Ennis's refusal to testify. *See Johnson*, 719 N.E.2d at 813.

explained by any reasonable strategy.

Ben-Yisrayl v. State, 738 N.E.2d 253, 260-61 (Ind. 2000) (citations and quotation marks omitted).

> When the claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post-conviction. If the claim relates to issue selection, defense counsel on post-conviction must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Thus, the defendant's burden before the post-conviction court [is] to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel.

Id. at 261-62 (emphases omitted).

We will address each of Johnson's allegations of error in turn.

1. Failure to Object to "Homicide" Jury Instruction

Final Instruction Number Seven reads as follows:

> You are instructed that if a person knowingly and feloniously inflicts an injury upon another person that causes an injury which results in death he is deemed by the law to be guilty of homicide, if the injury immediately or mediately causes the death of such person.
>
> Immediate cause is defined as the last of a series or chain of causes tending to a given result, and which, itself, and without the intervention of any further cause, directly produces the result or event.
>
> Mediate cause is defined as exhibiting indirect causation, connection or relation.

Appellate Record ("App. R.")[2] at 87. The jury was also instructed on the elements of murder and the lesser included offense of involuntary manslaughter. Johnson claims, however, that appellate counsel was ineffective in failing to raise trial counsel's failure to object to this

[2] Johnson submitted the record of proceedings from his prior appeal to the Indiana Supreme Court, as well as a brief appendix.

instruction. He argues that, by using the word "homicide" in Final Instruction Number Seven, the trial court "basically precluded a conviction for Involuntary Manslaughter[.]" Appellant's Br. at 12. He claims that the "common understanding" of the word "homicide" is murder and that, therefore, the jury would have been led to find him guilty of murder even if they found that he unknowingly and unintentionally caused Strycker's death by causing injury to him. We disagree. Homicide is commonly defined as "[t]he killing of one person by another" or "[a] person who kills another person." THE AMERICAN HERITAGE DICTIONARY 618 (2nd ed. 1991). As a legal term, the word is commonly defined in the same way. *See* BLACK'S LAW DICTIONARY 751 (8th ed. 1999) (defining homicide as "the killing of one person by another" or "a person who kills another"). Johnson has failed to establish that his trial counsel's failure to object to Final Instruction Number Seven fell below an objective standard of reasonableness or that it prejudiced his defense. Therefore, we cannot conclude that the post-conviction court erred in its decision to reject his claim of ineffective assistance of appellate counsel on this issue.

2. Failure to Request Aggravated Battery Instruction

Johnson also claims that his appellate counsel was ineffective in failing to raise an argument regarding trial counsel's failure to tender an instruction on the lesser-included offense of aggravated battery. Our supreme court has held that even though a shooting necessarily includes a battery, the lesser-included charge of battery is no longer viable when the victim dies as a result of the shooting. *See Guffey v. State*, 555 N.E.2d 152, 154-54 (Ind. 1990). The evidence supporting the trial court's verdict and the reasonable inferences

therefrom show that Johnson and Ennis beat and stabbed Strycker and that Strycker died as a result of those injuries. The trial court properly gave instructions to the jury on involuntary manslaughter and accomplice liability, in light of Johnson's defense that it was Ennis and not he who actually inflicted the fatal injuries that night. This defense did not entitle him to an aggravated battery instruction, however. *See Graziano v. State*, 685 N.E.2d 1064, 1065 (Ind. 1997) (concluding that trial court properly refused lesser included instruction on battery where evidence showed that defendant "either fired the fatal shots or…helped [another person] do so"). Because Johnson failed to show that the trial court should have permitted an aggravated battery instruction if it had been tendered, or that the giving of such an instruction would have led the jury to reach a different verdict, the post-conviction court did not err in denying his ineffective assistance claim.

3. Failure to Admit Ennis's Alleged Statement Against Interest

At trial, Laws testified that, five days after Strycker's murder, Ennis "had made a threat to everybody when we were in the basement talking." App.R. at 518. The State objected to the presentation of any content of the threat, presumably on the basis of hearsay.[3] The trial court sustained the State's objection regarding this so-called threat, and no evidence was admitted as to the substance of Ennis's statement. Johnson argues that his trial counsel should have attempted to admit the statement under the "statement against interest" hearsay exception set forth in Indiana Evidence Rule 804(b)(3).[4] With no evidence of what

[3] The trial transcript indicates that the State objected after Laws stated that Ennis had made a threat. Then the trial court and counsel discussed the objection off the record and outside the hearing of the jury. When defense counsel resumed questioning Laws, he asked, "I'm talking about what you observed not what you heard; you understand that?" Trial Tr. at 333.

[4] Section 804(b)(3) states in pertinent part as follows:

Ennis actually said, however, Johnson cannot show that he suffered any prejudice because the statement was not admitted. Johnson claims that the alleged threat "by it's [sic] nature was exculpatory of Johnson and inculpatory of [Ennis]." Appellant's Br. at 16. In our view, however, even if Ennis's "threat" were shown to be inculpatory as to himself, it would merely make a stronger case against Johnson as an accomplice. At any rate, Johnson has failed to produce any evidence that trial counsel's failure to pursue admission of Ennis's statement amounted to deficient performance or that the outcome of the trial would have been different if the statement had been admitted. Again, the post-conviction court did not err in rejecting Johnson's claim of ineffective assistance of counsel.

4. Failure to Object to Prosecutor's Comment

Johnson argues that appellate counsel was ineffective because he did not raise the issue of trial counsel's failure to object to a comment made by the prosecutor during LeMarr's testimony. LeMarr testified that Johnson "rescued" Strycker by removing him from the party, where people were threatening to hurt him. App.R. at 153-54. In response, the prosecutor asked LeMarr, "Are you familiar with the expression, 'out of [the] frying pan and into the fire'?" *Id*. at 154. Johnson contends that this statement was "inflammatory and prejudicial" and that trial counsel should have objected and requested the trial court to

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(b) **Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

….

(3) *Statement against interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

admonish the jury. Appellant's Br. at 16. Johnson has not demonstrated that, but for trial counsel's failure to request an admonition, the outcome of the trial would have been different. Thus, he cannot show that appellate counsel was ineffective in failing to raise this issue on appeal.

5. Cumulative Effect of Alleged Errors

Johnson claims that even if each of trial counsel's alleged errors does not rise on its own to the level of prejudice requiring a new trial, the cumulative effect of these errors makes the jury's verdict unreliable. We disagree. Johnson has failed to establish a reasonable probability that the jury would have found differently, *even if* trial counsel had made none of the errors Johnson alleges. Therefore, his allegations of appellate counsel's ineffective assistance for failing to raise these alleged errors of trial counsel, singularly or cumulatively, cannot prevail.

B. Appellate Counsel's Failure to Challenge Sentence

Johnson also claims that his appellate counsel was ineffective in failing to challenge the trial court's imposition of the maximum sixty-five-year sentence. He argues that the trial court erred in its consideration of his criminal history because it did not give significant mitigating weight to his lack of prior convictions. In fact, the trial court explained its consideration of the aggravating and mitigating factors in relevant part as follows:

> Your age—your [sic] 20, now is a mitigating circumstance. I don't see your prior criminal history truly as an aggravating circumstance. It's pretty minimal. In fact, I'm not even sure there's a prior conviction; although there is a prior arrest or pending misdemeanor at the time of this offense—a prior misdemeanor pending. So no prior convictions. You do have a controlled

> substance charge where you left the state of California and never appeared in court. I guess that's an aggravating circumstance.
>
> I guess the facts themselves . . . caused the Court to think that there are some aggravating circumstance[s] within—what happened that night. I guess the only thing that we really don't have indication of, after hearing Mr. Ennis' plea, and after going through the jury trial, is whether there was an intent at the time you left your home that evening to kill this young man. I don't know whether there was an intent formed prior to the time you left, or whether that just occurred during the sequence of events which occurred that evening. That it was unprovoked is certainly true; that it was very, very brutal is certainly true; that weapons were used, a fingernail file and a knife, true.
>
> And it does appear that, even though . . . you were the youngest of the participants, that you were the leader of the participants that evening. I think the victim's destiny was in your hands, and what happened to the victim that evening was in your hands. I think you controlled what did occur that evening. What I don't know is whether it just got out of hand or whether it was preplanned.
>
> ….
>
> I think those aggravating circumstances outweigh the sole mitigating circumstance and that's your age. I'm going to sentence you to 65 years at the department of corrections.

App.R. at 527-29.

The trial court's sentencing statement indicates that, contrary to Johnson's contention, the court recognized that he had no prior convictions and thus did not assign aggravating weight to his criminal history. The court did, however, consider as an aggravating circumstance Johnson's failure to appear before a California court on a controlled substance charge. One can see from the court's sentencing statement that it focused most upon the nature and circumstances of Johnson's crime, including the fact that the attack upon Strycker was unprovoked, "very, very brutal," and involved weapons, and that Johnson acted as the leader in the attack and, in essence, controlled Strycker's fate that night.[5] *Id*. at 528-29. The

[5] Johnson does not dispute the court's characterization of the nature and circumstances of the crime as a significant aggravator.

court gave mitigating weight to Johnson's young age. In our view, Johnson has failed to show that his appellate counsel's decision not to appeal the trial court's sentencing order fell below an objective standard of reasonableness or that such an appeal would have been successful.

In sum, we conclude that the evidence does not lead unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court on the issue of Johnson's appellate counsel's ineffectiveness. Johnson failed to show that his appellate counsel's performance was deficient or that it so prejudiced Johnson that there is a reasonable probability that, but for appellate counsel's alleged errors, the result of the appeal would have been different.

II. Newly Discovered Evidence

Finally, Johnson argues that the post-conviction court erred in rejecting his request for a new trial based upon the "newly discovered evidence" of Ennis's statement accepting full responsibility for Strycker's murder. To prevail on a newly discovered evidence claim, the petitioner must establish that: (1) the evidence was not available at trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result. *State v. McCraney*, 719 N.E.2d 1187, 1190 (Ind. 1999).

The post-conviction court made a specific finding that Ennis's testimony was "highly incredible." Appellant's App. at 8. We must give deference to the court's credibility determinations. *See McCraney*, 719 N.E.2d at 1191 ("Whether a witness' testimony at a

post-conviction hearing is worthy of credit is a factual determination to be made by the trial judge who has the opportunity to see and hear the witness testify. . . . It is not within an appellate court's province to replace the trial court's assessment of credibility with its own."). In his testimony before the post-conviction court, Ennis admitted that he and Johnson are friends and that his current version of events directly contradicts several prior statements he had made under oath to police and to the court at his guilty plea hearing. Further, Ennis himself conceded that, "without doubt," his credibility is suspect. Post-Conviction Hearing Tr. at 33.

Also, we note that the State presented a wealth of evidence to prove Johnson's guilt in this case. It is certainly not probable that Ennis's suspect testimony would outweigh all this evidence and lead to a different result at a new trial.

For all these reasons, we cannot conclude that the evidence leads unerringly and unmistakably to a conclusion opposite that of the post-conviction court. We therfore affirm its denial of Johnson's petition for relief.

Affirmed.

KIRSCH, C. J., and BAILEY, J., concur.